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No. 105, Original

IN THE

Supreme Court of the United States

October Term, 1985

STATE OF KANSAS,
Plaintiff,

v.

STATE OF COLORADO,
Defendant.

COLORADO'S ANSWER, COUNTERCLAIM, AND MOTION FOR APPOINTMENT OF SPECIAL MASTER

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ANSWER

Defendant, the State of Colorado, for its answer to the complaint filed in the above-captioned action by Plaintiff, the State of Kansas, states:

1. Defendant admits the Court has jurisdiction under the allegations in paragraph 1 of the complaint. Defendant denies that this is an appropriate case for the Court to exercise such jurisdiction because Plaintiff has failed to exhaust its administrative remedies under Article VIII. of the Arkansas River Compact.

2. Defendant admits the allegations in paragraph 2 of the complaint.

3. Defendant admits the allegations in paragraph 3 of the complaint.

4. Defendant admits that one of two major purposes of the Arkansas River Compact is quoted in paragraph 4 of the complaint. Defendant denies the allegations of paragraph 4 insofar as they assert that the purpose set forth in Article I.B. of the Compact is the "principal" purpose of the Arkansas River Compact.

5. Defendant admits that a portion of Article IV.D. of the Arkansas River Compact is quoted in paragraph 5 of the complaint. Defendant denies the allegations of paragraph 5 insofar as they assert Plaintiff's interpretation of Article IV.D.

6. Defendant admits that a portion of the first sentence of Article V.F. of the Arkansas River Compact is quoted in paragraph 6 of the complaint. The first sentence of Article V.F. in its entirety reads as follows:

> In the event the Administration finds that within a period of fourteen (14) days the water in the conservation pool will be or is liable to be exhausted, the Administration shall forthwith notify the State Engineer of Colorado, or his duly authorized representative, that

commencing upon a day certain within said fourteen (14) day period, unless a change of conditions justifies cancellation or modification of such notice, Colorado shall administer the decreed rights of water users in Colorado Water District 67 as against each other and as against all rights now or hereafter decreed to water users diverting upstream from John Martin Dam on the basis of relative priorities in the same manner in which their respective priority rights were administered by Colorado before John Martin Reservoir began to operate and as though John Martin Dam had not been constructed.

Defendant affirmatively alleges that the Arkansas River Compact Administration by resolution in 1980 adopted an operating plan for John Martin Reservoir which modifies the method by which the Administration finds that the water in the conservation pool is exhausted for the purposes of Article V.F.

7. Defendant denies the allegations in paragraph 7 of the complaint.

8. Defendant denies the allegations in paragraph 8 of the complaint.

9. Defendant denies the allegations in paragraph 9 of the complaint.

10. Defendant admits that for more than twenty years its agencies or officials have investigated ground water appropriations in the Arkansas River Basin in Colorado. Defendant denies the remaining allegations of paragraph 10 of the complaint.

11. Defendant denies the allegations in paragraph 11 of the complaint.

12. Defendant admits that the Arkansas River Compact Administration was in the process of conducting an investigation of alleged Compact violations pursuant to Article VIII.H. of the Arkansas River Compact at the time Plaintiff commenced this proceeding on December 16, 1985, and that

Defendant refused to enjoin all post-compact ground water appropriations in Colorado during the pendency of the investigation. Defendant admits that the Colorado representatives to the Arkansas River Compact Administration rejected requests by the Kansas representatives to investigate the consequences of possible future increases in the consumption of Colorado's "transmountain" return flows. Defendant denies the remaining allegations of paragraph 12 of the complaint.

13. Defendant denies the allegations in paragraph 13 of the complaint.

14. Defendant denies the allegations in paragraph 14 of the complaint.

15. Defendant denies the allegations in paragraph 15 of the complaint.

AFFIRMATIVE DEFENSES

1. Plaintiff failed to exhaust its administrative remedies under Article VIII. of the Arkansas River Compact.

2. Plaintiff's claims against Defendant are barred by laches, estoppel, waiver, or the equitable doctrine of unclean hands.

3. With regard to Plaintiff's claim that Defendant and its water users have materially depleted the usable and available stateline flows of the Arkansas River since the adoption of the Compact to the injury of water users in Kansas under the Compact, Defendant asserts that irrigation in the Arkansas River basin in Colorado has declined since the adoption of the Compact and that acreage under irrigation in western Kansas has increased at least five-fold in the same period, from approximately 56,000 acres in 1948 to 350,000 acres in 1980. Plaintiff seeks to have this Court rewrite the Arkansas River Compact to impose a new stateline delivery obligation on Colorado so as to maintain a post-compact well economy in western Kansas, all at the expense of Colorado water users, contrary to the express terms of the Compact.

4. Waters brought into the Arkansas River basin from other river basins are not apportioned to Kansas under the Arkansas River Compact and Plaintiff has no claim or right to such waters.

5. In 1980, the Arkansas River Compact Administration approved an operating plan for John Martin Reservoir pursuant to which water stored in the conservation pool of the reservoir is transferred into separate storage accounts for Kansas and ditches in Colorado Water District 67 at agreed upon rates and is apportioned into the accounts in agreed upon percentages. Based upon a series of agreements among Colorado water users, after water stored in the conservation pool is fully transferred to the separate storage accounts, but not necessarily released from the reservoir, Colorado reverts to administration of decreed priorities and the decreed rights of water users in Colorado Water District 67 are administered as against rights decreed to water users diverting upstream from John Martin Dam on the basis of relative priorities in the same manner as though John Martin Dam had not been constructed. The Colorado representatives approved the operating plan in 1980 and have allowed the operating plan to remain in effect from year-to-year thereafter, to the substantial benefit of Kansas water users, based upon the aforesaid agreements among Colorado water users to determine when a "call" by ditches in Colorado Water District 67 will be enforced above John Martin Reservoir. Those agreements were in turn based on an agreement to permit storage of historical direct-flow winter diversions upstream from John Martin Reservoir. Plaintiff has accepted the benefits of the 1980 operating plan and agreed to its terms with knowledge of the agreements among Colorado water users and with knowledge that the 1980 operating plan would change the regimen of the Arkansas River. Therefore, by having accepted the benefits of the 1980 operating plan, Plaintiff is barred from asserting that any reregulation of the native waters of the Arkansas River be approved by the Compact Administration based upon the Administration's Resolution of July 24, 1951.

6. With regard to Plaintiff's allegation that Defendant, through its Compact "Commissioner", has rejected and continues to reject Plaintiff's requests to investigate Defendant's "unilateral rejection" of the Arkansas River Compact Administration's Resolution of July 24, 1951, Defendant denies that the Resolution has any binding effect on Defendant. In the alternative, the Resolution was amended by the Administration on January 4, 1982. Further, Plaintiff failed to raise an objection to the winter storage program in Pueblo Reservoir for six years after it began operation in 1975 with the full knowledge of Plaintiff and the Administration.

COUNTERCLAIM

Defendant, the State of Colorado, by its Attorney General, asserts the following counterclaim against Plaintiff, the State of Kansas.

1. The Court has jurisdiction of this counterclaim under Article III, Section 2, Clause 2 of the Constitution of the United States, and Paragraph (a), Subsection (1), Section 1251, Title 28 of the United States Code.

2. The Arkansas River is an interstate stream which rises in the Rocky Mountains near Leadville, Colorado, then flows southeasterly to Salida, Colorado, then east through Canon City to Pueblo, Colorado, then across the plains of eastern Colorado into the State of Kansas.

3. In order to settle existing disputes and to remove causes of future controversy concerning the waters of the Arkansas River and to equitably divide and apportion between the States of Colorado and Kansas the waters of the Arkansas River, as well as the benefits arising from the construction, operation, and maintenance of John Martin Reservoir for water conservation purposes, the States of Colorado and Kansas ratified the Arkansas River Compact, which Compact was approved by the United States Congress by Act of May 31, 1949, 63 Stat. 145.

4. Article V.E.(2) of the Arkansas River Compact provides: "Water released upon concurrent or separate demands shall be applied promptly to beneficial use unless storage thereof downstream [from John Martin Reservoir] is authorized by the [Arkansas River Compact] Administration."

5. On information and belief, the state officials charged with administration of water rights in Kansas have allowed water released from John Martin Reservoir upon demand by Kansas under Article V. of the Arkansas River Compact to be stored downstream in Lake McKinney in Kansas rather than being applied promptly to beneficial use, in violation of the provisions of Article V.E.(2) of the Compact.

6. Subsequent to the approval of the Arkansas River Compact by the United States Congress in 1949, state officials charged with the administration of water rights in Kansas have allowed the construction of wells and have permitted ground water appropriations in Kansas that have materially depleted the usable quantity or availability for use to the surface water users in Kansas under the Compact. Those depletions caused Kansas to make additional demands for releases of water stored in John Martin Reservoir pursuant to the Compact to the detriment of water users in Colorado.

7. Irreparable injury to the State of Colorado and water users in Colorado under the Compact has been caused by the acts and conduct of the State of Kansas, its officers, and citizens in permitting the use of the waters of the Arkansas River in violation of the terms of the Compact.

WHEREFORE, having fully answered and having asserted its affirmative defenses and counterclaim, Defendant prays that the Court grant judgment for Defendant and against Plaintiff on the claims of Plaintiff, that the Court issue its decree compelling the State of Kansas, its officers, and citizens to comply with the provisions of the Arkansas River Compact, that

Defendant have and recover its reasonable costs, and for such other and further relief as the Court may deem just and proper under the circumstances.

Respectfully submitted,

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MOTION FOR APPOINTMENT OF SPECIAL MASTER

Defendant, the State of Colorado, by its Attorney General, respectfully moves the Court to appoint some suitable person as Special Master in this action and to refer this matter to him or her with authority to take evidence and to report the same to the Court with his or her findings of fact, conclusions of law, and recommendations for decree, all to be subject to approval or other disposition by this Court.

In support of this motion Defendant calls the attention of this Court to the pleadings, an inspection of which discloses many issues of fact which cannot be tried conveniently except by the appointment of a Special Master.

Respectfully submitted,

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